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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLIE ABUJUDEH, Plaintiff and Appellant, v. CITY OF LAKE FOREST, Defendant and Respondent.	G041604 (Super. Ct. No. 07CC10334) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Wu & Cheung LLP, Mark H. Cheung; and Roger Jon Diamond for Plaintiff and Appellant.

Best Best & Krieger LLP, Scott C. Smith, Jeffrey V. Dunn, and Marc S. Ehrlich for Defendant and Respondent.

* * *

INTRODUCTION

Charlie Abujudeh's massage establishment license was revoked by the City of Lake Forest (the City). Abujudeh's petition for a writ of administrative mandamus was denied, and he appeals from the resulting judgment. We affirm.

Substantial evidence supports the trial court's finding that two acts of disqualifying conduct were established in the administrative hearing, justifying the revocation of Abujudeh's license. We further conclude that the City did not commit misconduct in communications to the administrative hearing officer, and that the test the City requires massage technicians to pass does not violate equal protection guarantees.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Lake Forest BodyCentre (the BodyCentre) was a massage establishment located within the City. A massage establishment license to operate the BodyCentre had been issued to Charlie Abujudeh, the BodyCentre's owner and operator.

An undercover investigation of the BodyCentre was conducted by the Orange County Sheriff's Department, beginning in May 2006. The following violations of the Lake Forest Municipal Code were identified.

1. On May 19, 2006, Do Thi Nguyen performed a massage on Investigator Chris Wax, although Nguyen did not have a valid massage technician license at the time.

2. On June 9, 2006, Investigator Kevin Bieker received a massage from Jaclyn Dao Ledinh. Based on acts performed on Investigator Bieker, Ledinh was charged with and convicted of disorderly conduct for soliciting or agreeing to participate in acts of prostitution. (Pen. Code, § 647, subds. (a) & (b).)

3. On July 14, 2006, Liang Qing Wucherpfennig performed a massage on Investigator Bieker, although she did not have a valid massage license.

On July 14, 2006, six BodyCentre employees were arrested for vice violations. On that day, the BodyCentre's onsite manager, Christine Bui Vo, admitted to

Sheriff's Department personnel that she allowed some masseuses to give massages, although she knew they lacked valid licenses.

In April 2007, the City notified Abujudeh it intended to revoke his massage establishment license based on violations of the Lake Forest Municipal Code. An administrative hearing was conducted on May 30, 2007. The hearing officer issued a decision on June 28, 2007, revoking Abujudeh's massage establishment license. The officer found that Abujudeh was the operator of the Lake Forest BodyCentre; Jaclyn Dao Ledinh, who was working at the BodyCentre on June 9, 2006, was convicted of an act of prostitution (Pen. Code, § 647, subd. (b)) for acts committed that day; and several masseuses had performed unlicensed massages at the BodyCentre. The hearing officer also concluded she did not have jurisdiction to consider Abujudeh's constitutional arguments within the context of an administrative license revocation proceeding.

Abujudeh appealed the revocation of his license to the Lake Forest City Council. After briefing and argument, the City Council independently reviewed the administrative record and voted to affirm the hearing officer's determination that Abujudeh's license should be revoked.

Abujudeh then filed a petition for a writ of administrative mandamus in the trial court. The trial court denied the petition, and entered judgment against Abujudeh. Abujudeh timely appealed.

DISCUSSION

I.

THE APPEAL IS NOT MOOT.

The City argues Abujudeh's appeal is moot because Abujudeh sold the BodyCentre in June 2007. "A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief." (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) The City claims that because Abujudeh

no longer own the BodyCentre, the relief he seeks—restoration of his massage establishment license—is no longer available, making his appeal moot.

We disagree. Lake Forest's own massage establishment license application requires an applicant to list all professional licenses previously held or applied for, and to state whether any such license has been revoked or suspended. This court's ruling may have a practical impact on Abujudeh, and the appeal is not moot.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S JUDGMENT.

A. *Standard of Review*

"A trial court's review of an administrative decision is subject to two possible standards depending on the nature of the right involved. [Citation.] [¶] If the administrative decision involved or substantially affected a 'fundamental vested right,' the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. [Citations.] [¶] Where no fundamental vested right is involved, the trial court's review is limited to examining the administrative record to determine whether the agency's decision and its findings are supported by substantial evidence in light of the whole record. [Citation.]" (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 468-469.)

"On appeal, whichever standard was used below, the standard for review of the trial court's factual determinations is whether they are supported by substantial evidence. [Citations.] '[A]n appellate court must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. [Citations.] A reviewing court will not uphold a finding based on evidence which is inherently improbable [citation], or a finding based upon evidence which is irrelevant to the issues. [Citations.]' [Citation.] The reviewing court, like the trial court, may not

reweigh the evidence, and is 'bound to consider the facts in the light most favorable to the Board, giving it every reasonable inference and resolving all conflicts in its favor. [Citations.]' [Citation.]" (*Jaramillo v. State Bd. for Geologists & Geophysicists* (2006) 136 Cal.App.4th 880, 889.)

B. *Grounds for Revocation of Abujudeh's Massage Establishment License*

The Municipal Code allows for revocation of a massage establishment license if "[t]he licensee has engaged in disqualifying conduct as described in Section 5.07.100(F)," or if "[t]he licensee has employed or otherwise allowed a person to work as a massage technician or massage practitioner at the massage establishment who: [¶] . . . [d]oes not have a valid permit; or [¶] . . . [h]as engaged in disqualifying conduct as described in Section 5.07.100(F) . . . at the massage establishment." (Lake Forest Mun. Code, § 5.07.400(C)(2) & (5)(c).) Disqualifying conduct, as is relevant to this case, "means the occurrence of any of the following events[,] . . . in the case of non-renewal, revocation or suspension proceedings, within five (5) years of the date of notice of hearing . . . : [¶] 1. A conviction in a court of competent jurisdiction of any of the following: [¶] a. Any misdemeanor or felony offense which relates directly to the operation of a massage establishment, or during the performance of a massage, whether as a massage establishment owner or operator, or as a massage technician or massage practitioner; [¶] . . . [¶] c. Any crime specified in California Penal Code . . . Section 647(a) or 647(b)." (Lake Forest Mun. Code, § 5.07.100(F)(1)(a) & (c).)

The hearing officer's decision to revoke Abujudeh's massage establishment license was based on four acts of disqualifying conduct: (1) the jury verdict finding Ledinh guilty of violating Penal Code section 647, subdivisions (a) and (b); (2) Wucherpfennig's performance of a massage while lacking a valid license; (3) Ledinh's performance of a massage while lacking a valid license; and (4) Nguyen's performance of a massage while lacking a valid license. The trial court's judgment in

favor of the City must be affirmed if there was substantial evidence of a single act of disqualifying conduct. As explained, *post*, there was substantial evidence of two acts of disqualifying conduct.

C. *Violation of Penal Code section 647*

At the time of the administrative hearing, the Lake Forest Municipal Code regarding massage establishments defined "conviction" as "*a verdict or formal judgment of guilt*, or entry of a plea of guilty or nolo contendere in a criminal proceeding." (Lake Forest Mun. Code, § 5.07.100(E), italics added.) Ledinh was found guilty of violating Penal Code section 647, subdivisions (a) and (b), on April 4, 2007. The jury's verdict constitutes disqualifying conduct justifying the revocation of Abujudeh's massage establishment license.

Abujudeh cites several cases to support his argument that "conviction" under the Lake Forest Municipal Code requires a final judgment, meaning there was no "conviction" involving Ledinh at the time of the administrative hearing. These cases are not applicable because they involve statutes where the terms "conviction" and "convicted" were not defined. In *Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, 1072-1074 (*Boyll*), the court considered whether a guilty plea to a felony charge, which was never followed by entry of a judgment of conviction, was a conviction for purposes of a statute reading, "'(a) [e]xcept as provided in [Government Code section 1029,] subdivision (b), any person who has been *convicted* of a felony in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony if committed in this state, is disqualified from holding office or being employed as a peace officer of the state, county, city, city and county or other political subdivision, whether with or without compensation, and is disqualified from any office or employment by the state, county, city, city and county or other political subdivision, whether with or without compensation, which confers upon the

holder or employee the powers and duties of a peace officer.' [Citation.]" The court noted: "As appears in the case law, the terms 'convicted' or 'conviction' do not have a uniform or unambiguous meaning in California. Sometimes they are used in a narrow sense signifying a verdict or guilty plea, some other times they are given a broader scope so as to include both the jury verdict (or guilty plea) *and* the judgment pronounced thereon. [Citations.] However, where, as in the instant case, a civil disability flows as a consequence of the conviction, the majority and better rule is that 'conviction' must include both the guilty verdict (or guilty plea) *and* a judgment entered upon such verdict or plea." (*Id.* at pp. 1073-1074.) The court held that because a judgment was never entered, no conviction had occurred. "In the case at bench, the facts are undisputed that after appellant had pleaded guilty to a felony charge, the court suspended the further criminal proceedings against her without rendition of judgment or imposition of a sentence and committed appellant to the custody of the Department of Corrections for the purpose of participating in a narcotics rehabilitation program pursuant to Welfare and Institutions Code section 3051. It is likewise without dispute that after a successful completion of the narcotics rehabilitation program the trial court dismissed the criminal charge pursuant to Welfare and Institutions Code section 3200 and thereby released her from all penalties and liabilities, resulting from the offense under Penal Code section 1203.4. The conclusion is thus inescapable that appellant falls squarely within the cases cited above and that in the absence of a judgment of conviction or imposition of sentence she cannot be deemed to be 'convicted' under [Government Code] section 1029 and cannot be deprived of her fundamental civil right to obtain a public employment as a peace officer." (*Id.* at pp. 1075-1076.) *Boyll* is not on point, because the Lake Forest Municipal Code defined the term conviction, and there is no ambiguity as to the meaning of the term as it appears in section 5.07.100(E).

The court in *Boyll* many times stated it was analyzing the word "conviction" within the meaning of Government Code section 1029, a statute not at issue

in this case. We acknowledge that parts of the *Boyll* opinion point out that a "civil disability" did flow from the definition of "conviction" in it and other cases and chose the narrowest definition as the better one. But *Boyll* does not hold that a statute or municipal code can never define "conviction" to include a jury verdict, and no other case has so held. We also decline to hold that a statute or municipal code can never define "conviction" as the City did in the ordinance at issue here.

In *Helena Rubenstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 421, the appellate court concluded "under California law a 'conviction' for the purpose of exclusion from public office 'consists of a jury verdict or court finding of guilt followed by a judgment upholding and implementing such verdict or finding.'" In reaching this conclusion, the court relied, in part, on Government Code section 1770, subdivision (h), which provides that a public office becomes vacant when the public official is convicted of a felony, and specifically defines conviction as "'when trial court judgment is entered.'" (*Helena Rubenstein Internat. v. Younger, supra*, 71 Cal.App.3d at p. 413.) In the present case, by contrast, the Lake Forest Municipal Code defines conviction as the jury verdict alone.

In *Truchon v. Toomey* (1953) 116 Cal.App.2d 736, 737, an individual pled guilty to a felony. By statute, after completing his probation he was "'released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.'" (*Ibid.*, quoting Pen. Code, § 1203.4.) Although the California Constitution at that time denied the right to vote to anyone "convicted of an infamous crime," (Cal. Const., art. II, former § 1), the appellate court held the individual was not "convicted" as that term is used in that section of the Constitution: "The word 'conviction' obviously has two meanings, one narrow and the other broad . . . . [W]hen considering the impositions of penalties and disabilities, particularly such a serious disability as that of disfranchisement, it is important that such imposition be made only when the proceeding causing it to be imposed is finally completed. Just as in 1822 when

the New York Constitution was adopted, the people of New York had in mind as set forth in *People v. Fabian* [(N.Y. 1908) 85 N.E. 672] a broad definition of the word 'conviction,' in the disfranchisement section, so, too, must the people of California have been similarly minded when they placed in the Constitution of 1849 practically the same provision. [Citation.]" (*Truchon v. Toomey, supra,* 116 Cal.App.2d at pp. 743-744, fns. omitted.) The loss of a massage establishment license is not the same thing as disenfranchisement.

In *In re Riccardi* (1920) 182 Cal. 675, 676, disbarment of an attorney was sought after he had been found guilty of a felony of moral turpitude, but while an appeal of that judgment was pending. The Supreme Court held that there was no final conviction justifying the attorney's permanent disbarment during the pendency of the appeal. (*Id.* at p. 679.) By contrast, Abujudeh has not permanently lost the ability to own and operate a massage establishment. Abujudeh is free to apply for a new license in Lake Forest or elsewhere.

For the first time at oral argument, Abujudeh argued that there was not substantial evidence supporting the trial court's findings because no evidence of the conduct underlying Ledinh's conviction was offered at the administrative hearing. The Lake Forest Municipal Code does not require such evidence. What is required is proof of a conviction in a court of competent jurisdiction of a violation of Penal Code section 647, subdivisions (a) or (b). The City offered admissible evidence of Ledinh's conviction under Penal Code section 647, subdivisions (a) and (b); it was not required to reprove the crimes.

D. *Performing Massages Without a Valid License*

The license revocation was also based on the performance of massages by three different massage technicians, who did not have valid licenses at the time. While we agree with Abujudeh that there was not substantial evidence that two of the massage

technicians performed massages without valid licenses, there was substantial evidence that a third massage technician did so. A single instance of disqualifying conduct is sufficient to revoke a massage establishment's license.

1. Wucherpfennig

Abujudeh argues the City failed to prove Wucherpfennig performed a massage without a license because the only evidence of Wucherpfennig's lack of a license was hearsay evidence.

"The Hearing Officer shall conduct the hearing under such rules of procedure as are appropriate to quasi-judicial proceedings, provided that the licensee and the City shall be entitled to present relevant evidence, testify under oath, and call witnesses who shall testify under oath and that *the Hearing Officer shall not be bound by the statutory rules of evidence in the hearing, except that hearsay evidence may not be the sole basis for the determination of the Hearing Officer*. The City shall have the initial burden of proof." (Lake Forest Mun. Code, § 5.07.420(B), italics added.) The City concedes that only hearsay evidence was offered as proof that Wucherpfennig did not have a valid license at the time she performed a massage on Investigator Bieker. The City argues that because nonhearsay evidence was offered through Investigator Bieker's testimony to prove he received a massage from Wucherpfennig, Lake Forest Municipal Code section 5.07.420 therefore permits the second prong of the lack of a license to be proven through hearsay evidence. We disagree.

We review de novo the proper construction of this provision of the Lake Forest Municipal Code. (*Pope v. Superior Court* (2006) 136 Cal.App.4th 871, 875.) The administrative hearing officer interpreted this provision as follows: "As long as there is nonhearsay evidence to support at least one ground for revocation, then nonhearsay evidence can be admitted to support that and other grounds for revocation under the way this ordinance is read." We agree with the hearing officer's analysis, although the hearing officer then failed to apply the rule as she had interpreted it.

The ground for revocation asserted is Wucherpfennig's performance of a massage without a license. That ground has two elements: performance of a massage, and lack of a valid license. No nonhearsay evidence supporting the license element was offered, and therefore there was no nonhearsay evidence supporting the ground for revocation.

The City alternatively contends the evidence of Wucherpfennig's lack of a valid license was proven by nonhearsay evidence, because a report stating Wucherpfennig did not have a valid license is admissible under the official records exception to the hearsay rule. (Evid. Code, § 1280.)[1] The "report" is an intra-departmental memorandum prepared by a sheriff's department investigator. The author does not identify the source of the information referred to in the memorandum. No information is provided explaining how or why it was determined that Wucherpfennig (or any other massage technician mentioned in the memorandum) lacked a valid license. The City asserts the memorandum's trustworthiness is established because it was prepared by an investigator two weeks after the raid at the BodyCentre. The problem with this analysis is there is no showing the investigator who prepared the report had any involvement in the actual investigation, and specifically no proof he had any personal knowledge of the facts set forth in the memorandum. Finally, the report does not state who determined Wucherpfennig did not have a valid license, or how that determination was reached.

Therefore, revocation of the massage establishment license could not be based on Wucherpfennig's performance of a massage without a valid license.

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[1] "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

2. Ledinh

The City concedes that substantial evidence was not offered that Ledinh performed a massage without a valid license.

3. Nguyen

The hearing officer admitted a portion of a sheriff's department initial crime report prepared by Investigator Wax, reading as follows: "On 07-14-2006 at about 1800 hours, Investigators from the Sheriff's Department conducted a business inspection of Lake Forest Body[Centre]. During the course of the inspection, photographs were taken of the massage therapist's [*sic*] at the location. I reviewed the 5 photographs given to me and identified 'Darlene' (Nguyen, Do Thi 12-10-1952) as the female who gave me a massage on 05-19-2006. A review of the massage license's [*sic*] issued by the Sheriff's Department for Lake Forest Body[Centre] showed Nguyen is not licensed to practice massage in the city of Lake Forest."

Unlike the intra-departmental memorandum referred to *ante*, Investigator Wax's report is subject to the hearsay exception for official public records. (Evid. Code, § 1280; *Donley v. Davi* (2009) 180 Cal.App.4th 447, 461.) The report establishes both elements of the grounds for revocation—that Nguyen performed a massage at the massage establishment, and at that time she did not then have a valid license to do so. The massage establishment license could properly be revoked based on Nguyen's performance of a massage without a valid license.

Abujudeh denied at the administrative hearing that Nguyen performed a massage without a license. He impliedly concedes that Nguyen did not have a massage license on May 19, 2006, because (1) she had a cosmetology license and worked at the BodyCentre as a cosmetologist; and (2) she received her massage license shortly after the July 2006 raid. Nguyen's possession of a cosmetology license, and her receipt of a

massage license in August 2006 are facts from which a reasonable inference could be made by the hearing officer that Nguyen did not have a valid massage license in May 2006.

Abujudeh also argues that he did not admit Nguyen performed a massage. No such admission was required, because the evidence from Investigator Wax's police report that Nguyen performed a massage on him on May 19, 2006, was admissible under the exception to hearsay rule.

IV.

THE CITY DID NOT COMMIT MISCONDUCT.

Abujudeh argues the City committed prosecutorial misconduct by attempting to unduly influence the hearing officer. At the hearing, Abujudeh sought to raise challenges to the constitutionality of portions of the Lake Forest Municipal Code. The City objected on grounds of lack of jurisdiction, and the hearing officer overruled that objection. The hearing officer then proposed that the parties submit supplemental briefs on the constitutional issues, but denied either party the opportunity to present new evidence.

On June 1, 2007, the City Attorney wrote to the hearing officer reiterating the City's position that any consideration of the constitutional issues raised by Abujudeh would exceed the hearing officer's jurisdiction, and stating that the City would not pay the hearing officer for any time expended on the constitutional issues after May 31, 2007. The parties then agreed to brief the limited threshold issue of the hearing officer's jurisdiction to consider the constitutional issues. The City confirmed it would remit payment for all services rendered by the hearing officer including consideration of the supplemental briefs and additional oral argument, if necessary.

After the parties submitted their supplemental briefs, the hearing officer ruled that she lacked jurisdiction to consider the constitutionality of the Lake Forest Municipal Code.

Abujudeh claims the City's June 1 letter to the hearing officer was improper because the City was attempting to condition the hearing officer's decision on being paid, and asserting its control over the purse strings. Abujudeh relies on *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024, in which our Supreme Court held, "a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will." Significantly, the *Haas* court, while refusing to pass judgment on any particular set of rules for the selection of temporary administrative hearing officers, did suggest in dicta that in order to eliminate the potential of financial bias a local government body "that wished to continue appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor" that government body. (*Haas, supra,* 27 Cal.4th at p. 1037, fn. 22.)

The Lake Forest Municipal Code contains specific guidelines for the selection of a hearing officer to preside over the proceeding to revoke a massage establishment license. The Municipal Code states: "'Hearing Officer' means the City Manager or the designee of the City Manager as provided below. Unless the parties stipulate in writing to have the City Manager serve as the Hearing Officer, the Hearing Officer shall be an independent third party. The Hearing Officer shall either be: (i) a person employed by a recognized dispute resolution organization such as JAMS, IVAMS, the American Arbitration Association selected as provided below; or (ii) an attorney duly licensed to practice law within the State of California who has served as a

judge, commissioner, or judge pro tem, in the state or federal trial or appellate courts to whom the parties have mutually agreed upon in writing. A Hearing Officer employed by a recognized dispute resolution organization shall be selected as follows: (i) *The City Manager shall select the recognized dispute organization on a rotation basis such that no organization is retained for consecutive or concurrent items*; (ii) the City Manager shall request scheduling information, terms of payment, and a list of five (5) potential hearing officers from the organization; (iii) the City Manager shall provide the list of hearing officers to the licensee and within five (5) days thereafter the City Manager or designee and the licensee shall confer and select the Hearing Officer from the list provided. If the parties cannot mutually agree on the selection of a Hearing Officer then each party may excuse two of the listed persons from the list in which event the person remaining on the list after exercise of all rights to excuse shall be appointed as the Hearing Officer. *No Hearing Officer shall be selected or shall conduct a hearing who has been previously selected and received remuneration for serving as a Hearing Officer for the City within the previous one hundred eighty (180) days.* All third party Hearing Officers shall comply with the ethical standards for neutral arbitrators imposed under Code of Civil Procedure § 1281.85 and such rules, standards, and guidelines as may be promulgated by the Judicial Council from time to time, thereunder. The parties may stipulate in writing to an equitable sharing of costs incurred, including the cost of retaining the Hearing Officer." (Lake Forest Mun. Code, § 5.07.100(G), italics added.)

Rotation of the alternative dispute resolution providers, and the 180-day blackout period for individual hearing officers are sufficient protections to meet the standard the Supreme Court stated would overcome any appearance of financial bias.

At oral argument, Abujudeh argued two cases not cited in the briefs were relevant to his argument of prosecutorial misconduct. This court provided the City with an opportunity to respond to these cases. Having considered Abujudeh's argument and the City's written response, we conclude the cases are inapposite to the issue presented in

this case. In *Esteybar v. Municipal Court* (1971) 5 Cal.3d 119, 122, the Supreme Court held a magistrate may not be required to obtain the prosecuting attorney's consent before determining a charged offense is a misdemeanor rather than a felony, under the separation of powers doctrine. In *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 97-98, the court concluded having the same individual represent the city when it denied an adult entertainment operator's renewal application, and serve as the hearing officer's legal advisor during a subsequent administrative hearing "confound[ed] . . . the functions of *advocacy* and adjudication" and therefore violated the operator's due process rights. Accordingly, neither of these cases is on point to the issues before us.

V.

THE CITY'S REQUIRED TEST FOR MASSAGE TECHNICIANS DOES NOT VIOLATE THEIR EQUAL PROTECTION RIGHTS.

Abujudeh argues the City's testing scheme for massage technicians violates the massage technicians' equal protection rights by adversely affecting minority workers who speak English as a second language.[2] The Lake Forest Municipal Code requires an applicant for a massage technician license to complete the testing procedure specified by the City. (Lake Forest Mun. Code, § 5.07.320(B)(4).) The Municipal Code provides for two types of testing procedures—one developed and administered by the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB), and another developed and administered by the City Manager—and gives the City Manager the authority to select which testing procedure the City will require. (Lake Forest Mun. Code, §5.07.340.) The City uses the NCBTMB test. Abujudeh claims that because the

[2] The City contends Abujudeh lacks standing to assert this argument. Without deciding the question of standing, we consider the issue on the merits.

NCBTMB test does not permit the applicant to have the test translated by a court-certified interpreter, it violates equal protection.

Our Supreme Court has explained: "'In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1 . . . , we described the two principal standards or tests that generally have been applied by the courts of this state and the United States Supreme Court in reviewing classifications that are challenged under the equal protection clause of the Fourteenth Amendment of the United States Constitution or article I, section 7, of the California Constitution. As the court in *D'Amico* explained: "The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it*." [Citation.] [¶] The court in *D'Amico* further explained that "[a] more stringent test is applied . . . in cases involving 'suspect classifications' or touching on 'fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. [Citations.] Under the strict standard applied in such cases, *the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.' [Citation.]" [Citation.]' [Citation.]" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480.)

The portion of the Lake Forest Municipal Code permitting the City Manager to require massage technician applicants to pass the NCBTMB test before being licensed is an example of economic or social welfare legislation, which is reviewed under the rational relationship test, and for which Abujudeh would have the burden of

demonstrating its invalidity. No fundamental interest is involved. (*San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 33-34 [right to be admitted to certain profession is not a fundamental right guaranteed by the Constitution]; *D'Amico v. Board of Medical Examiners, supra,* 11 Cal.3d at pp. 18-19 [rational relationship test applies to test legislation distinguishing between graduates of allopathic and osteopathic schools].)

Abujudeh has failed to establish the use of the NCBTMB test does not have a rational relationship to a legitimate purpose of the City, namely to ensure basic competency of massage technicians working in the City. The test permits applicants to use a translations dictionary during the exam. Although the City's test would permit applicants to hire a court-certified interpreter, this does not mean another method for accommodating non-English speaking applicants violates equal protection.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.